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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Paper No. 13

Application Number: 09/199,506

Filing Date: November 25, 1998

Appellant(s): ZETTEL ET AL.

Helen Tinsley
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 04/10/2003.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) Status of Claims

The statement of the status of the claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows: Claim 1-44 are currently under non-final rejection, the prosecution was re-opened in light of new found reference. (Derzay et al., different inventive entity owned by the same assigned.)

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 1-44 do not stand or fall together and provides reasons as set forth in 37 C.F.R. § 1.192(c)(7) and (c)(8).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

The following is a listing of the prior art of record relied upon in the rejection of the claims under appeal.

5,938,607	Jago et al.	8-1997
5,786,994	Friz et al.	7-1998
5,629,871	Love et al.	5-1997
6,434,572 *	Derzay et al.	8-2002
EPO 00371605 **	Gary et al.	6-1990

(*) The pertinent art, which is applied to reject the claimed inventions under obviousness Double patenting and 35 U.S.C. § 102(f).

(**) Extrinsic evidence requested by applicant.

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Reliance on MPEP§ 1208.01, the examiner rewritten the rejection to clarify his position, no new reference added, statutory ground of rejection remain unchanged.

Double Patenting

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 C.F.R. § 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 C.F.R. § 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 C.F.R. § 3.73(b).

2. Claims 1-44 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-59 of U.S. Patent No. 6434572. Although the conflicting claims are not identical, they are not patentably distinct from each other because the context of the claims invention are drawn to the same subject matters, which are a computer method, apparatus and system for communication of service request from medical diagnostic stations to a remote server, the server then response to the service request. Both set of claims incorporated conventional message construction and transmission means and steps, e.g., user interface, e-mail capability, communication module in the diagnostic stations. The instant claims are presented in several versions, each version either comprising different nomenclatures or adding element that is readily inherent in the patent's claims. Regardless the claims revision, the scope of the claims are not patentable distinct from the patent claims.

Claim Rejections - 35 U.S.C. § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
> (f) he did not himself invent the subject matter sought to be patented.

4. Claims 1-44 are rejected under 35 U.S.C. § 102(f) because the applicant did not invent the claimed subject matter. The Derzay et al. (US 6,434,572) discloses an invention for use in medical diagnostic systems such as imaging system e.g. computed tomography (CT) system, X-ray system, positron emission tomography (PET) system, ultrasound system and nuclear medicine system. Also for image data acquisition, picture archiving communications and retrieval systems, image management systems, facility or institution management systems, viewing systems, etc., in the field of medical diagnostics. The claimed invention automatically handles a service request from a medical diagnostic station. Messaging modules formulate and transmit reply messages transmitted from the server in response to the request. A remote access network (80) connected to the server and the messaging module receives the request and transmits the reply message. The disclosure and the claimed invention also included a centralized service facility and a remote service provision method to medical diagnostic system. After carefully inspection of the instant application and the Derzay reference disclosures, in the exception of summary and claims section, they are identical. The subject matters, which applicant sought to be patented could also be derived from Derzay reference cited in the passages as described in the following parenthesis, (See Derzay, Fig. 1-16; Col. 2, line 40-Col. 3, line 62; Col. 4, line 62-Col. 5, line21; Col. 6, lines 50-53; Col. 7, lines 14-50; Col. 7, line 65-Col. 8, line 10; Col. 10, lines 23-42; Col. 12, lines 25-38; Col. 13, lines 34-53; Col. 18, lines 43-67; Col. 19, lines 18-58; Col. 20, lines 28-38; Col. 21, lines 4-45).

Evidently, the Derzay disclosure clearly raised the issue of derivative invention from another (see MPEP § 2137).

Claim Rejections - 35 U.S.C. § 103

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claims 1-6, 8-13, 15-23 and 25-44 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Jago et al. (US. 5,938,607) and Friz et al. (US. 5,786,994), [*the instant claims are italicized*].

7. As to claim 1, Jago discloses the invention substantially, including *a system for servicing a medical diagnostic apparatus, the system comprising:*

a diagnostic apparatus (ultrasound system (ULS) 10, fig. 1) *including a service server for, originating a request for diagnostic apparatus service* (SMTP server 102 fig. 1; electronic message (EM) capturing problem, image, error log of the ULS, constructing an EM and send to its manufacturer, Col. 7, line 63-Col. 8, line 48) *and a network communications module for transmitting the service request* (the system 10, further, included HTTP server, and communication means, e.g., TCP/IP, PPP, Modem and Ethernet port for communicating EM to the manufacturer, fig. 1, Col. 2-3);

a service facility, remote from the diagnostic apparatus (the manufacturer, Col. 8-lines 5-26), *the service facility including a network server for receiving the service request and exchanging data with the diagnostic apparatus in response to the service request* (the manufacturer returning EM the ULS and organizing web page for exchanging information with the ULS, this teaching implied at least a web server is at the manufacturer, Col. 8, lines 49-52).

Even though, Jago taught several means and method steps for generating and communicating, error log, report, image, etc. in form EM from the ULS to its manufacturer and in response, the manufacturer returning EM to the respective ULS. Jago teaching fails short of explicitly say that the information, which is sent to the manufacturer included a request for servicing, e.g., repairing, of the ultrasound equipment, i.e. "*operational servicing of diagnostic apparatus*".

However, in an analogous art, motivated by attempting to minimize operation cost while maintaining quality control (QC), which required for controlling laser imaging quality to conform with the standard set forth by regulatory. Government regulation is intended to prevent unnecessary re-shoot incident, which may course from many variations, e.g., personnel expertise, or inadequate equipment maintenance. The re-shoot of medical diagnostic modalities (MDM), e.g., Laser Imager, CIT, MRI, etc., could expose the patients to excessive radiations, which may endanger their health and consequently led to litigation problem (Friz, Col. 1, line 11-Col. 2, line 67). Friz suggested, incorporation performance monitoring system (PMS) with MDM, the PMS is a software that can be installed in any location, i.e., local or remote computers. The PMS is configured to periodically polling the error log of each of the MDM, when an error or a problem is found, the PMS automatically initiated service request to a remote location, i.e., field technician, etc., (Friz, Col. 3, lines 23-45; Col. 11, lines 3-20).

Thus, simply modifying the operation of Jago's polling and e-mail capability with the idea of on-site problems analysis and service call initiation, to analyze Jago's equipment problems and initiate service calls from within Jago's ultrasound system or other medical devices as suggested by Friz, would have been obvious to one of ordinary skill in the art at the time of the invention was made. Because incorporate such ideas required minimum modification and cost, the combination would enable Jago to better controlling quality of service provided to its equipment, patients, in addition to, minimizing equipment downtime, preventing unexpected equipment failures, and etc.

8. As to claim 8, Jago discloses the invention substantially, including *an apparatus for providing service to medical diagnostic systems, the apparatus comprising:*

plurality of medical diagnostic systems (Jago, fig 2, element 200, 202), *each diagnostic system including a diagnostic station* (each of 200, 202 is represented by ultrasound system 10, which, included ultrasound 28, fig. 1), *a station interface for accessing data from the station* (ultrasound system controller 18 access and control ultrasound 28, fig 1, Col. 6, lines 5, line 66-Col. 6, line 3), *an operator interface for initiating a request for service of the diagnostic system* (fig . 1, element 20, 22, 27-28; Col. 3 lines 3-30; Col. 8, lines 5-25), *and communications circuitry for transmitting and*

receiving data (several communication means, e.g., TCP/IP 46, PPP 48, Serial port and modem 31and 32, including Ethernet connections 50);and

a service facility linked to the plurality of medical diagnostic systems via a network (manufacture or repair man, or hospital central office, Col. 8- lines 5-26; the service facility including, a server for transmitting data to and receiving data from the plurality of medical diagnostic systems via the network manufacturer can organized web page for exchanging information with the ultrasound system, implicit the manufacturer at least a server, Col. 8, lines 49-52).

Even though, Jago taught several means and method steps for generating and communicating, error log, report, image, etc. in form EM from the ULS to its manufacturer and in response, the manufacturer returning EM to the respective ULS. Jago teaching fails short of explicitly say that the information, which is sent to the manufacturer included a request for servicing, e.g., repairing, of the ultrasound equipment, i.e. "*operational servicing of diagnostic apparatus*".

However, in an analogous art, motivated by attempting to minimize operation cost while maintaining quality control (QC), which required for controlling laser imaging quality to conform with the standard set forth by regulatory. Government regulation is intended to prevent unnecessary re-shoot incident, which may course from many variations, e.g., personnel expertise, or inadequate equipment maintenance. The re-shoot of medical diagnostic modalities (MDM), e.g., Laser Imager, CIT, MRI, etc., could expose the patients to excessive radiations, which may endanger their health and consequently led to litigation problem (Friz, Col. 1, line 11-Col. 2, line 67). Friz suggested, incorporation performance monitoring system (PMS) with MDM, the PMS is a software that can be installed in any location, i.e., local or remote computers. The PMS is configured to periodically polling the error log of each of the MDM, when an error or a problem is found, the PMS automatically initiated service request to a remote location, i.e., field technician, etc., (Friz, Col. 3, lines 23-45; Col. 11, lines 3-20).

Thus, simply modifying the operation of Jago's polling and e-mail capability with the idea of on-site problems analysis and service call initiation, to analyze Jago's equipment problems and initiate service calls from within Jago's ultrasound system or other medical devices as suggested by Friz, would have been obvious to one of ordinary skill in the art at the time of the invention was made. Because incorporate such ideas required minimum modification and cost, the combination would enable Jago to better controlling quality of service provided to its equipment, patients, in addition to, minimizing equipment downtime, preventing unexpected equipment failures, and etc.

9. As to claim 15, Jago discloses the invention substantially, including *a system for remotely servicing medical diagnostic equipment, the system comprising:*

a first medical diagnostic station of a first modality (Jago, fig 2, element 200), *the first medical diagnostic station including a service server for accessing data representative of a serviceable operational condition of the first station* (SMTP server. 102, fig. 1, the electronic messaging system automatically capture information, problem, error log, problem occurrence Col. 8, lines 15-19);

a second medical diagnostic station of a second modality different from the first modality (Jago, fig 2, element 202), *the second medical diagnostic station including a service server for accessing data representative of a serviceable operational condition of the second station* (Fig. 1 also represent architecture of element 202 fig. 2, which also included SMTP server. 102, fig. 1, the electronic messaging system automatically capture information, problem, error log, problem occurrence Col. 8, lines 15-19);

a service facility remote from the first and second stations, the service facility including a server for interactively exchanging data with the first and second stations (the ultrasound system 200, 202, exchange service operational data with their manufacturer system, via electronic message of using web browser to brows of post information on the manufacturer web page, Col. 8, lines 5-26, lines 49-57).

Even though, Jago taught several means and method steps for generating and communicating, error log, report, image, etc. in form EM from the ULS to its manufacturer and in response, the manufacturer returning EM to the respective ULS. Jago teaching fails short of explicitly say that the information, which is sent to the manufacturer included a request for servicing, e.g., repairing, of the ultrasound equipment, i.e. "*operational servicing data*".

However, in an analogous art, motivated by attempting to minimize operation cost while maintaining quality control (QC), which required for controlling laser imaging quality to conform with the standard set forth by regulatory. Government regulation is intended to prevent unnecessary re-shoot incident, which may course from many variations, e.g., personnel expertise, or inadequate equipment maintenance. The re-shoot of medical diagnostic modalities (MDM), e.g., Laser Imager, CIT, MRI, etc., could expose the patients to excessive radiations, which may endanger their health and consequently led to litigation problem (Friz, Col. 1, line 11-Col. 2, line 67). Friz suggested, incorporation performance monitoring system (PMS) with MDM, the PMS is a software that can be installed in any location, i.e., local or remote computers. The PMS is configured to periodically polling the error log of each of the MDM, when an error or a problem is found, the PMS automatically initiated service request to a remote location, i.e., field technician, etc., (Friz, Col. 3, lines 23-45; Col. 11, lines 3-20).

Thus, simply modifying the operation of Jago's polling and e-mail capability with the idea of on-site problems analysis and service call initiation, to analyze Jago's equipment problems and initiate service calls from within Jago's ultrasound system or other medical devices as suggested by Friz, would have been obvious to one of ordinary skill in the art at the time of the invention was made. Because incorporate such ideas required minimum modification and cost, the combination would enable Jago to better controlling quality of service provided to its equipment, patients, in addition to, minimizing equipment downtime, preventing unexpected equipment failures, and etc.

10. As to claim 22, Jago discloses the invention substantially, including a method for providing remote service to a medical diagnostic system, the method comprising the steps of:

originating a service request for operational servicing of the medical diagnostic system via a user interface in the medical diagnostic system (ultrasound system, fig. 1, include SMTP server, 102 fig. 1; electronic message contains problem, image, etc. is produce by the ultrasound system sent from ultrasound to manufacturer or repair man, Col. 7, line 63-Col. 8, line 48);

transmitting the service request to a service facility via a network connection request (electronic massager system, SMTP server communicate which manufacture via TCP/IP 46, PPP 48,Serial port and modem 31and 32, including Ethernet connections 50; manufacture or repair man, or hospital central office, Col.8- lines 5-26);

acknowledging receipt of the service request automatically by the service facility via an electronic message to the medical diagnostic system (after received message from ultrasound, the manufacturer return mail directly to ultrasound system mail box Col. 8, lines 23-29).

Even though, Jago taught several means and method steps for generating and communicating, error log, report, image, etc. in form EM from the ULS to its manufacturer and in response, the manufacturer returning EM to the respective ULS. Jago teaching fails short of explicitly say that the information, which is sent to the manufacturer included a request for servicing, e.g., repairing, of the ultrasound equipment, i.e. "*operational servicing of diagnostic apparatus*".

However, in an analogous art, motivated by attempting to minimize operation cost while maintaining quality control (QC), which required for controlling laser imaging quality to conform with the standard set forth by regulatory. Government regulation is intended to prevent unnecessary re-shoot incident, which may course from many variations, e.g., personnel expertise, or inadequate equipment maintenance. The re-shoot of medical diagnostic modalities (MDM), e.g., Laser Imager, CIT, MRI, etc., could expose the patients to excessive radiations, which may endanger their health and consequently led to litigation problem (Friz, Col. 1, line 11-Col. 2, line 67). Friz suggested, incorporation performance monitoring system (PMS) with MDM, the PMS is a software that can be installed in any location, i.e., local or remote computers. The PMS is configured to periodically polling the error log of each of the MDM, when an error or a problem is found, the PMS automatically initiated service request to a remote location, i.e., field technician, etc., (Friz, Col. 3, lines 23-45; Col. 11, lines 3-20).

Thus, simply modifying the operation of Jago's polling and e-mail capability with the idea of on-site problems analysis and service call initiation, to analyze Jago's equipment problems and initiate service calls from within Jago's ultrasound system or other medical devices as suggested by Friz, would have been obvious to one of ordinary skill in the art at the time of the invention was made. Because incorporate such ideas required minimum modification and cost, the combination would enable Jago to better controlling quality of service provided to its equipment, patients, in addition to, minimizing equipment downtime, preventing unexpected equipment failures, and etc.

11. As to claim 29, Jago discloses the invention substantially, including a method for exchanging service data between a plurality of medical diagnostic systems and a central service facility, the method comprising the steps

of:

*composing a service message on a medical diagnostic system, (*electronic message system in the ultrasound capturing and sending electronic message from the system to manufacturer, Col. 7, line 63-Col. 8, line 48)*;*

linking the medical diagnostic system to a remote service facility via a network connection (the ultrasound device communicated with repair man or manufacturer via on of the links, e.g., TCP/IP 46, PPP 48,Serial port and modem 31and 32, including Ethernet connections 50);

transmitting the service message from the medical diagnostic system to the remote service facility (the ultrasound system send performance *information*, e.g., error, status, etc, to remote manufacture or repair man Col. 8- lines 5-26);

replying to the service message by the service facility to the medical diagnostic system via a return electronic message (manufacturer doe having capability of replying mail and send after received, without intervention, the message from ultrasound, the manufacturer return mail directly to ultrasound system mail box col. 8, lines 23-29).

Jago does not explicitly disclose *the service message relating to operational servicing of the medical diagnostic system.* Although applicant fails provide specific meaning of such phrase, but in light of remark provided by the applicant in response to the First Office Action, (paper number 4, file 01/28/2002). A service request for operational service of the diagnostic apparatus, in fact applicant referred does not means a request for using the diagnostic apparatus or request for image or report produce from the apparatus. In light of statement "The system 400 or 500 relate to patient exams rather than *operational servicing* of the diagnostic apparatus, as recites in claim 1." Broadly, interpretation, the claim referred to a service request for service that related to the diagnostic apparatus.

Although, Jago teaching includes means and method steps for generating and communicating, information, e.g., error log, report, image, etc. from the ultrasound system to its manufacturer. Jago fails short of saying that the sending information included a request for servicing the ultrasound equipment, or the diagnostic apparatus.

However, in an analogous art, motivated by attempting to prevent endangering patients, which might occur from failure of the medical diagnostic equipment, i.e., laser imagers, and attempting to reduce service cost and downtime of the laser imagers, in addition motivated by attempting to ensure quality of image, which would be produced from the laser imagers in order to prevent malpractice, which might lead to a litigation (these motivations can be found in Friz, Col. 1, line 11-Col. 2, line 67), Friz taught an improved system to included a software for either locally or remotely automatically monitoring quality and performance of the laser imagers; automatically generating error port and automatically initiating service request for maintenance the laser imagers, if a problem is found (Friz, Col. 3, lines 23-45; Col. 11, lines 3-20).

Thus, it would have been obvious to one of ordinary skill in the art at the time of the invention was made to be motivated by Friz's rationale to modify the capability of sending information from the ultrasound system to a remote facility such as Manufacturer or engineering house or service facility as claim.

Because, taking advantage form Friz idea, one could expedite service call, reducing time waste, achieved lowering downtime and service cost, minimizing chance of being penalized of failing to compliance with government regulation or being litigated, and etc.

12. As to claim 36, Jago discloses the invention substantially, including *a method for servicing a plurality of medical diagnostic systems, the method comprising the steps of:*

generating a first service request message in a first diagnostic system of a first modality (Jago, fig 2, element 200, included SMTP server 102, fig. 1, the electronic messaging system automatically capture information, problem, error log, problem occurrence Col. 8, lines 15-19);

generating a second service request message in a second diagnostic system of a second modality different from the first modality (Fig. 1 also represent architecture of element 202 fig. 2, which also included SMTP server. 102, fig. 1, the electronic messaging system automatically capture information, problem, error log, problem occurrence Col. 8, lines 15-19);

transmitting the first and second service request messages to a service facility remote from the first and the second diagnostic systems (Both station 200, 202 included electronic massager system, SMTP server communicate which manufacture via TCP/IP 46, PPP 48,Serial port and modem 31and 32, including Ethernet connections 50; manufacture or repair man, or hospital central office, Col.8- lines 5-26);

transmitting acknowledgment messages from the service facility to the first and second diagnostic system in response to the first and second service request messages (after received message from ultrasound, the manufacturer return mail directly to ultrasound system mail box Col. 8, lines 23-29).

Even though, Jago taught several means and method steps for generating and communicating, error log, report, image, etc. in form EM from the ULS to its manufacturer and in response, the manufacturer returning EM to the respective ULS. Jago teaching fails short of explicitly say that the information, which is sent to the manufacturer included a request for servicing, e.g., repairing, of the ultrasound equipment, i.e. "*operational servicing of diagnostic apparatus*".

However, in an analogous art, motivated by attempting to minimize operation cost while maintaining quality control (QC), which required for controlling laser imaging quality to conform with the standard set forth by regulatory. Government regulation is intended to prevent unnecessary re-shoot incident, which may course from many variations, e.g., personnel expertise, or inadequate equipment maintenance. The re-shoot of medical diagnostic modalities (MDM), e.g., Laser Imager, CIT, MRI, etc., could expose the patients to excessive radiations, which may endanger their health and consequently led to litigation problem (Friz, Col. 1, line 11-Col. 2, line 67). Friz suggested, incorporation performance monitoring system (PMS) with MDM, the PMS is a software that can be installed in any location, i.e., local or remote computers. The PMS is configured to periodically polling the error log of each of the MDM, when an error or a problem is found, the PMS automatically initiated service request to a remote location, i.e., field technician, etc., (Friz, Col. 3, lines 23-45; Col. 11, lines 3-20).

Thus, simply modifying the operation of Jago's polling and e-mail capability with the idea of on-site problems analysis and service call initiation, to analyze Jago's equipment problems and initiate service calls from within Jago's ultrasound system or other medical devices as suggested by Friz, would have been obvious to one of ordinary skill in the art at the time of the invention was made. Because incorporate such ideas required minimum modification and cost, the combination would enable Jago to better controlling quality of service provided to its equipment, patients, in addition to, minimizing equipment downtime, preventing unexpected equipment failures, and etc.

13. Claim 2, Jago-Friz discloses *the diagnostic apparatus includes a network browser user interface for defining the service request originated by the server and transmitted by the network communications module* (Jago, Browser 100, Fig.1; Col.8, lines 49-57).
14. Claim 3, Jago-Friz discloses *the system includes data storage device coupled to the network server* (Jago, image & report storage 24, fig.1 library in HIS 400 RIS 500, fig.2; Col.9, line 49-55). The storage (library) storing service data (Jago, image from ultrasound service, exam categories, Col.9, lines 62-65) representative of identifying or operational parameters (Jago, categories identify type of service abdominal, obstetrical, etc., Col.9, lines 66-67) of the diagnostic apparatus (Jago, Col. 9, line 59-Col. 10, line 15).
15. Claim 4, Jago-Friz discloses the data representative of a diagnostic apparatus type and location. Specially, Friz taught a software system configured to monitor system problem, automatically generated error report and automatically dispatch the request for service in response to error condition, Col 3, lines 34-45, dispatching request for service of system remotely located, details information, e.g., type of machine, problem and location are required and thereby inherent, since such details information must be used for reaching destination and preparing service. Thus It would have obvious to one of ordinary skill in the art at the time of the invention was made to include details information such as system type and location when making service request from Jago system. Because, including, such information, would eliminate acquiring information associated with the failure system, which is required for servicing from technicians, hence, service the system can be expedited.
16. Claim 5, Jago-Friz discloses at least one field service unit, the field service unit including a network browser and a network communications module for linking the field service unit to the service facility network server (Jago, apparatus 200, fig.2, comprises Ethernet, Modem and Browser as illustrates in fig. 1, Col. 9, lines 49-58).
17. Claim 6, Jago-Friz discloses the service facility includes a messaging circuit configured to formulate and transmit a message to the diagnostic apparatus in response to the service request the HIS and RIS communicate with diagnostic apparatus at the remote location or in the field by using browser HTML, SMTP, POP (Jago, Fig.1-2; Col.6, lines 7-67; Col.10, lines 15-49). That anticipates the service facility includes a messaging circuit configured to formulate and transmit a message to the diagnostic apparatus in response to the service request.
18. Claims 9 and 10, Jago-Friz discloses at least two of the plurality of medical diagnostic systems include stations of the deferent modality types, wherein the types

include magnetic resonance imaging stations, computer tomography station, X-ray stations or ultrasound stations (Friz, Col. 1, lines 12-23). For the same reason as discussed in claim 4 above, It would have been obvious to one of ordinary skill in the art at the time of the invention was made to incorporate modality-type information in the system.

19. Claim 11, Jago-Friz discloses at least two of medical diagnostic systems are coupled to a management station via an intranet in a medical facility (diagnostic stations 200, 202; Ethernet Hub 304, administration station 302, fig.2; Col.9, lines 49-53), and wherein the management station is linked to the service facility via the network (administration station 302, Ethernet Hub 304, hospital, service facility 302, fig.2; Col.9, lines 49-53).

20. Claim 12, Jago-Friz discloses the communications circuitry is coupled to the station interface for transmitting data representative of station operating parameters to the service facility (Jago, parameters 82, 84, fig.3; communication means 31-32, 46-50, fig 2; download reference for RIS, Col.9, lines 49-Col.10 lines 15).

21. Claim 13, Jago-Friz discloses each diagnostic system includes a memory circuit for storing log data and wherein the memory circuit transmits the log data and the communication circuitry is coupled to memory circuit and transmitting the log data to the service facility (Jago parameter storage 82, 84, fig.3, modem Ethernet, Fig. 2; report storage 24, Fig. 1; Friz sending error report Fig. 3; Col. 10, line 59-Col. 11, line 44.)

22. Claim 16, Jago-Friz discloses a first and second modalities selected from groups of magnetic resonance imaging (MRI) systems, computed exhaust tomography (CT) systems, x-ray systems (XR) and ultrasound systems (US) (Friz, Col.1, lines 11-23; Col. 4, lines 13-41; Col. 6, line 56-Col. 7, line 4).

23. Claim 17, Jago-Friz discloses each station includes an operator interface for initiating a service request for operational servicing of the respective station and a communications circuit for transmitting the service request to the service facility (Jago Browser 100, Fig.2, Ethernet and T1 for TX/Rx data, see detail Col.3, lines 14-19; Col.8, line 23 – Col.9, line 10; Col.13, lines 6-9).

Claims 18-19, Jago-Friz discloses the invention substantially as described in claim 17, including manufacturer includes capability of returning e-mail to the respective ultrasound, or medical diagnostic station, in response to received e-mail from the station.

24. Claims 20-21, Jago-Friz the serviceable condition includes malfunction and operator usable information of the station (usage report, error report, Friz, abstract).

25. Claim 27, Jago-Friz discloses a pre-configured browser page accessible on the user interface (Jago Browser 100, Fig.1; Col.8, lines 49-57).

26. Claim 28 Jago-Friz disclose displaying a visual indicia at the medical apparatus (Jago Browser is part of apparatus, 100, Fig.1; Col. 8, lines 49-57; Col.9, lines 49-57).

27. Claim 31, Jago-Friz discloses the unique identifier as discussed in claim 26.

28. Claim 32, Jago-Friz discloses the invention substantially as described in claim 29, including automatically accessing electronics record (automatically accessing electronic record is inherent in automatically generating report, Friz's abstract).

29. Claims 33-34, Jago-Friz the electronic record includes data representative operational service history (reports include usage report and error report, Friz's abstract).

30. Claim 35, Jago-Friz discloses the invention substantially as described in claim 29, including automatic linking device and facility (automatically sending report, implied automatically linking, Friz's abstract).

31. Claims 37 and 38 are method claims corresponding to the system in claims16 and 18, respectively. They are rejected by the same rationale.

32. Claim 39 Jago-Friz discloses the service request messages include data uniquely identifying respective diagnostic system. Specially, Friz's requesting service and error report sending out to service technicians or service facility, inherently taught type of problem related to the respective apparatus, type of apparatus and other related information. Thus, for the same rationale and motivation as discussed in claim 4, above, It would have obvious to one of ordinary skill in the art at the time of the invention was made to incorporate identifying information in the service request as claimed.

33. Claim 40 recites limitations as in claims 26, 25 and 19; Claim 41 recites limitations as in claims 36, 35 and 29. They are rejected by the same rationale.

34. Claim 42-43, Jago-Friz discloses the service data includes configuration parameter data for the diagnostic system (Jago, parameter 82, diagnostic parameters 84, fig.3).

35. Claim 44, Jago-Friz discloses the service facility includes a plurality of service facilities disposed at locations remote from one another (the system include hospital, which is one of a service facilities).

36. Claims 7, 14 and 24 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Jago-Friz as applied to claims 1, 8 and 22, and in view of Love et al. (US. 5,629,871).

37. Claim 7, Jago-Friz discloses the invention substantially as discussed in claim 1, but fails to disclose scheduling operational service of the diagnostic system.

Jago- Friz, both suggested periodically polling performance status of the medical apparatus, in order to avoid unexpected mechanical failures, which may endanger patient. However, ordinary artisan, who work with mechanical parts would recognize that polling error log and performance status as suggested in Jago-Friz may provide quick resolution but deficiency is may not be an effective way to prevent mechanical failure, which may course from wear and tear of age of the parts. Thus some kind of preventive mechanism that could provide what is known in the field engineer, as "Preventive Maintenance" would be a good idea, such feature would allow technicians to maintenance the equipment to prevent failure.

However, in analogous art (Jago, Friz and the instant claims invention), Love taught a concept applicable for medical equipments, motivated by the same concern, e.g., patient safety and maintenance cost, which also suggested, in Jago-Friz, (Love, Col. 2, lines 11-30), Love introduced a concept of adding maintenance computation mechanism with the equipment to predict the wear and tear trend of equipment's predict expect failure and schedule maintenance (see Love fig. 6-8).

Thus, it would have been obvious to one of ordinary skill in the art at the time of the invention was made to incorporate scheduling service as taught by Love with Jago-Friz. Because scheduling service, which known in the art as preventive maintenance

would prevent unexpected failure, which will lead to endanger patient health, extensive loss of time and revenue, and reducing repair cost.

38. Claims 14 and 24, Jago-Friz discloses the invention substantially as discussed in claim 8, including transmitting log data, but fail to disclose the transmitting in response to prompt, e.g., schedule received from the manufacturer.

However, in analogous art (Jago, Friz and the instant claims invention), Love taught a concept applicable for medical equipments, motivated by the same concern, e.g., patient safety and maintenance cost, which also suggested, in Jago-Friz, (Love, Col. 2, lines 11-30), Love introduced a concept of adding maintenance computation mechanism with the equipment to predict the wear and tear trend of equipment's predict expect failure and schedule maintenance (see Love fig. 6-8).

Thus, it would have been obvious to one of ordinary skill in the art at the time of the invention was made to incorporate scheduling service as taught by Love with Jago-Friz, to scheduling or prompting a request from remote to acquired date from any local device, including medical apparatus. Because scheduling service, which known in the art as preventive maintenance would prevent unexpected failure, which will lead to endanger patient health, extensive loss of time and revenue, and reducing repair cost.

(11) Response to Argument

Issue No. 1:

As to claim 1 applicant argued in substance that, the prior arts failed to teach:

a. a service request for operational servicing of the diagnostic apparatus;

b. exchanging data with the diagnostic apparatus in response to the service request;

c. no motivation to combine the references.

As top point a., Examiner disagreed, Jago taught, the electronic messaging system of an ultrasound system automatically capturing performance information of the ultrasound and sending to its manufacturer, (SMTP server fig.1; Col. 8, lines 15-19); Friz taught a software functioning as a performance monitoring system that included automatically initiating server request to a remote locations (Col. 3, 23-45; Col. 11, 3-20).

As to point b., Examiner disagreed Jago taught the manufacturer and the ultrasound interaction, via electronic message and web page (Col. 8, lines 15-26 and lines 49-57).

As to point c., Examiner disagreed, Friz taught clear motivations, why one would want to initiate a service call from a medical diagnostic apparatus, e.g., ensuring patient safety, cost effective due to down time and service time loss, prevent unaccepted poor quality, which might lead to malpractice litigation (Friz, Col. 1, line 11-Col. 2, line 67).

As to claim 8, applicant argued in substance that, the prior arts failed to teach:

a. initiating service requests for operational servicing of the diagnostic system;

b. no motivation to combine the references.

As top point a., Examiner disagreed, Jago taught, the electronic messaging system of an ultrasound system automatically capturing performance information of the ultrasound and sending to its manufacturer, (SMTP server fig.1; Col. 8, lines 15-19); Friz taught a software functioning as a performance monitoring system that included automatically initiating server request to a remote locations (Col. 3, 23-45; Col. 11, 3-20).

As to point b., Examiner disagreed, Friz taught clear motivations, why one would want to initiate a service call from a medical diagnostic apparatus, e.g., ensuring patient safety, cost effective due to down time and service time loss, prevent unaccepted poor quality, which might lead to malpractice litigation (Friz, Col. 1, line 11-Col. 2, line 67).

As to claim 15, applicant argued in substance that, the prior arts failed to teach:

a. a service server for accessing data representative of a serviceable operational condition of the first and the second station;

b. a server for interactively exchanging operational service data with the first and second stations.

c. no motivation to combine the references.

As top point a., Examiner disagreed, Jago taught, the electronic messaging system of an ultrasound system automatically capturing performance information of the ultrasound and sending to its manufacturer, (SMTP server fig.1; Col. 8, lines 15-19); Friz taught a software functioning as a performance monitoring system that included automatically initiating server request to a remote locations (Col. 3, 23-45; Col. 11, 3-20).

As to point b., Examiner disagreed; Jago (Col. 8, lines 5-25) taught interactively exchanging operational data between the ultrasound and manufacturer.

As to point c., Examiner disagreed, Friz taught clear motivations, why one would want to initiate a service call from a medical diagnostic apparatus, e.g., ensuring patient safety, cost effective due to down time and service time loss, prevent unaccepted poor quality, which might lead to malpractice litigation (Friz, Col. 1, line 11-Col. 2, line 67).

As to claim 22, applicant argued in substance that, the prior arts failed to teach:

a. originating a service request for operational servicing of the medical diagnostic apparatus system;

b. transmitting the service request to service facility;

c. acknowledging receipt of the service request automatically by the service facility via electronic message to the medical diagnostic apparatus;

d. the prior art fails to suggested motivation to combine the references.

As top point a., Examiner disagreed, Jago taught, the electronic messaging system of an ultrasound system automatically capturing performance information of the ultrasound and sending to its manufacturer, (SMTP server fig.1; Col. 8, lines 15-19); Friz taught a software functioning as a performance monitoring system that included automatically initiating server request to a remote locations (Col. 3, 23-45; Col. 11, 3-20).

As to point b., Examiner disagreed, Jago (Col. 8, lines 5-25) taught an error or problem is automatically send to manufacturer; Friz (Col. 3, 23-45; Col. 11, 3-20), taught a service call is initiated and send to a service personnel at a remote location (see, Friz, 3, lines 39-42; Jago, Col. 8, lines 15-20).

As to point c., Examiner disagreed; Jago (Col. 8, lines 5-48) taught manufacturer received, review and send electronic message back to ultrasound mailbox.

As to point d., Examiner disagreed, Friz taught clear motivations, why one would want to initiate a service call from a medical diagnostic apparatus, e.g., ensuring patient safety, cost effective due to down time and service time loss, prevent unaccepted poor quality, which might lead to malpractice litigation (Friz, Col. 1, line 11-Col. 2, line 67).

As to claim 29, applicant argued in substance that, the prior arts failed to teach:

a. applicant requested an evidence for well-known assertion of acknowledging action.

b. composing an operational servicing on a medical diagnostic system;

c. a service message is transmitted to facility from the medical a diagnostic system;

d. the prior art fails to suggested motivation to combine the references.

As to point a., although it is indisputable, and was explicitly stated and exemplified is the original final rejection that several e-mail systems included acknowledging notion, e.g., auto-reply features, TCP/IP included acknowledging signal (claims 18-19). Furthermore, the Jago reference even taught a manufacturer or a repairman returning mails in response to incoming e-mail directly to the respective ultrasound system, these are clear teaching of acknowledging action. Applicant insisted that examiner must provide supporting evident. Thus, the examiner cited Gary et al., as extrinsic evidence in response to applicant requested. The Gary suggested the use of automatically reply e-mail, approximately 10 year prior to the filling date of this application (See abstract).

As to points b and c, Examiner disagreed; Jago (Col. 8, lines 5-48) taught the electronic messaging system (EMS) which is incorporated each ultrasound system, ((SMTP server, 102 fig. 1); the EMS captured performance status of a respective ultrasound device and send to the manufacture or repair man (Col. 8, lines 3, 23-45; Col. 11, 3-20).

As to point d, Examiner disagreed, Friz taught clear motivations, why one would want to initiate a service call from a medical diagnostic apparatus, e.g., ensuring patient safety, cost effective due to down time and service time loss, prevent unaccepted poor quality, which might lead to malpractice litigation (Friz, Col. 1, line 11-Col. 2, line 7).

As to claim 36, applicant argued in substance that the action included Pinsky et al. citation and the prior arts failed to teach:

a. generating and transmitting service requests for diagnostic apparatus.

c. well-known acknowledging assertion;

c. a service message is transmitted to facility from the medical a diagnostic system;

d. the prior art fails to suggested motivation to combine the references.

In response to Pinsky issue, the rejection was erroneous. The Pinsky was applied during first office action and was mistakenly left in. To clarify the issue, the Pinsky is removed from the rejection reproduced above.

As to point a., applicant reiterated the same argument over and again. The same substance has been addressed in claims 1-29. Further, Jago figure 2, shown a plurality of ultrasound system can be connected to a remote location, each ultrasound system has the same architecture as shown in Fig. 1. In fact, Jago teaching can be reiterated to any number of generating or transmitting in any number of devices. The claim merely makes use of a singularity with a plurality system, it is not patentable distinct from Jago-Friz.

As to point c and d., they are the same arguments are presented in claim 29 (a, d). They have readily been addressed, in claim 29 above.

Issue 2:

As to claims 7, 8 and 14, applicant argued in substance that, the prior arts failed to suggest combining Love and Jago-Friz.

Examiner disagreed; Jago- Friz, both suggested periodically polling performance status of the medical apparatus, in order to avoid unexpected mechanical failures, which may endanger patient. However, ordinary artisan, who work with mechanical parts would recognize that polling error log and performance status as suggested in Jago-Friz may provide quick resolution but deficiency is may not be an effective way to prevent mechanical failure, which may course

from wear and tear of mechanical parts. Thus, some kind of preventive maintenance would be preferably. In analogous art (Jago, Friz and the instant claims invention), Love taught a concept that is applicable for medical equipments, motivated by the similar concern, e.g., patients safety and maintenance cost, which also suggested, in Jago-Friz, (Love, Col. 2, lines 1-30), Love suggested, adding maintenance computation mechanisms with the equipment to predict the wear and tear trend of equipment's predict expect failure and schedule maintenance (see Love fig. 6-8).

Hence, applicant argument in call aspect presented above is not persuasive.

Issue 3:

Applicant alleged that the Derzay does not render obvious variation over the instant claims. As discussed above in rejection section, Derzay has indisputable qualification as a reference for double patenting rejection. The issue in hand is whether the instant claims inventions are obvious variation over Derzay claims, whether one skill in the art, upon reading Derzay disclosure, would capable of tailoring a set of claims, as claimed therein.

Scope, of Derzay claims, is directed to functionalities of methods and systems for communicating service request and response between diagnostic station and a server, while scope of the instant claims is drawn to functionalities of methods and systems for communicating service request and response between diagnostic station and a server. Merely revising claims by adding, removing, re-arranging or making singular system to plural system would not distinguish the instant claims over the Derzay claims.

The following is claim comparison, which is produced to support examiner position (*instant claims are italicized*).

Patent claim 10 v. Instant claims 1, 8 and 15.

The patent claim 10 depended on claim 1; the language of claim 10 is combined for convenience and clarification.

(The patent claim 10), A system for providing remote service to a plurality of medical diagnostic stations, the system comprising:

a server for automatically handling a service request composed by a medical person at a medical diagnostic station, the service request relating to operational performance of the medical diagnostic station;

a messaging module for automatically formulating and transmitting a reply message to the station in response to the service request; and

communications circuitry coupled to the server and to the messaging module for receiving the service request and transmitting the reply message;

wherein the system includes a plurality of service facilities in different geographical locations linked to one another via a data communications network.

(The instant claim 1), A system for servicing a medical diagnostic apparatus, the system comprising:

a diagnostic apparatus including a service server for, originating a service request for operational servicing of the diagnostic apparatus and a network communications module for transmitting the service request;

a service facility remote from the diagnostic apparatus, the service facility including a network server for receiving the service request and exchanging data with the diagnostic apparatus in response to the service request.

The instant claim 1 obviously broadened the scope of Derzay claim 10.

(The instant claim 8), An apparatus for providing service to medical diagnostic systems, the apparatus comprising:

a plurality of medical diagnostic systems, each diagnostic system including a diagnostic station, a station interface for accessing data from the station, an operator interface for initiating service requests for operational servicing of the diagnostic system, and communications circuitry for transmitting and receiving data; and

a service facility linked to the plurality of medical diagnostic systems via a network, the service facility including, a server for transmitting data to and receiving data from the plurality of medical diagnostic systems via the network.

The instant claim 8 added inherent elements, e.g., operator interface, station interface, which are required for a medical person to compose service request and are required for accessing performance information in order to associated with the request.

(Instant claim 15), A system for remotely servicing medical diagnostic equipment, the system comprising:
a first medical diagnostic station of a first modality, the first medical diagnostic station including a service server for accessing data representative of a serviceable operational condition of the first station;
a second medical diagnostic station of a second modality different from the first modality, the second medical diagnostic station including a service server for accessing data representative of a serviceable operational condition of the second station;
a service facility remote from the first and second stations, the service facility including a server for interactively exchanging operational service data with the first and second stations.

While the instant claim 15, recites two modalities communicated service request with a server, similarly, the patent claim 10 recites a plurality of diagnostic stations communicate service request to a server. It would have been obvious to one ordinary skill in the art that is merely nomenclatures and re-wording, there is no new functionality added into the instant claim, enough to render patentable distinct.

The Patent claim 34 v. the instant claims 15, 22, 29 and 36.

(The patent claim 34), A method for providing remote service to a plurality of medical diagnostic systems, the method comprising the steps of:
receiving a plurality of service requests composed by medical persons from at least a first diagnostic system of a first modality and a second diagnostic system of a different modality, the service requests relating to operational performance of the respective diagnostic system;
accessing service files for the first and the second diagnostic systems;

addressing the service requests to respective modality technicians for handling; and automatically transmitting reply messages to the first and the second diagnostic systems in response to the service requests.

(The instant claim 15), A system for remotely servicing medical diagnostic equipment, the system comprising:

a first medical diagnostic station of a first modality, the first medical diagnostic station including a service server for accessing data representative of a serviceable operational condition of the first station;

a second medical diagnostic station of a second modality different from the first modality, the second medical diagnostic station including a service server for accessing data representative of a serviceable operational condition of the second station;

a service facility remote from the first and second stations, the service facility including a server for interactively exchanging operational service data with the first and second stations.

Such claim language is presented in the method claim 34 of the patent, which would have been obvious to one ordinary engineering skill to apply the method for constructing a system or apparatus.

(Instant claim 22) A method for providing remote service to a medical diagnostic system, the method comprising the steps o£

originating a service request for operational servicing of the medical diagnostic system via a user interface in the medical diagnostic system;

transmitting the service request to a service facility via a network connection;

acknowledging receipt of the service request automatically by the service facility via an electronic message to the medical diagnostic system.

Even though, both claims have the same functionality, for instances, receiving service requests composed by a person at a plurality of modalities, this implied the existence of the user interface, step of originating and transmitting the requests.

(The instant claim 29), A method for exchanging service data between a plurality of
medical diagnostic systems and a central service facility, the method comprising the steps of:

composing a service message on a medical diagnostic system, the service message relating to operational servicing of the medical diagnostic system;

linking the medical diagnostic system to a remote service facility via a network connection;

transmitting the service message from the medical diagnostic system to the remote service facility for remote operational servicing of the medical diagnostic system; and

automatically replying to the service message by the service facility to the medical diagnostic system via a return electronic message.

The instant claim is a broader version of Derzay claim 34, the linking and transmitting step inherent and implicit in the Derzay claimed receiving step.

(The instant claim 36), A method for servicing a plurality of medical diagnostic systems, the method comprising the steps of:

generating a first service request message in a first diagnostic system of a first modality for operational servicing of the first diagnostic system;

generating a second service request message in a second diagnostic system of a second modality different from the first modality for operational servicing of the second diagnostic system;

transmitting the first and second service request messages to a service facility remote from the first and the second diagnostic systems; and

transmitting acknowledgment messages from the service facility to the first and second diagnostic system in response to the first and second service request messages.

The instant claim 36 is an obvious variation of Derzay claim 34, which providing a server communication with two different modality, including composing request is the modalities communicating the request from each modality to remote server.

Issue No. 4:

The rejection is maintained.

Applicant traversed rejection under 35 U.S.C. § 102(f), cited that "Care were taken in preparing the present claims (which has not been substantially amended) and in naming the appropriate inventive entities on both the present application and in Derzay et al. patent. The respective inventors were well informed and all executed the required declarations prior to

filing." Further, applicant admitted that the are common inventor, "In fact, some inventors are even the same ion Derzay et al. and the present application because a team of worked together on various aspect of the system." Further admission, "Each inventors executed a declaration under 37 C.F.R. 1.63 swearing that the statutory requirement at the time of filing the declaration."

Applicant does not argued impropriety of examiner applying the 35 U.S.C. § 102(f); the above quotations merely stipulated that there are common inventors, who declared to disclose the information under 37 C.F.R. § 1.56, which is a requirement under 37 C.F.R. § 1.63(b)(3).

However, to clarify examiner position, reliance on the MPEP § 2137, "Where it can be shown that an applicant "derived" an invention from another, a rejection under 35 U.S.C. § 102(f) is proper." Ex parte Kusko, 215 USPQ 972, 974 (Bd. App. 1981) ("most, if not all, determinations under section 102(f) involve the question of whether one party derived an invention from another").", MPEP § 2137. Derzay came to light, raised a question whether who invented the claims invention, since there are two inventive entities, provided nearly identical disclosures. After carefully consideration, the examiner found, in the exception slightly different of field of the invention, summary of the invention claim sections, they recited verbatim and had the same amount of identical drawings. Further, applicant himself cited several passages of the instant specification, in the summary of this Brief, to support the claims invention, which are in the parenthesis below (**Applicant's citations**: page 2, line 1-page 3, line 32; page 7, line 15-page 8, line 3; page 10, line 14-17; page 11, lines 6-32; page 12, lines 14-22; page 16, line 11-24; page 19, lines 20-29; page 21, lines 14-26; page 29, line 27-page 31, line 26; page 32 lines 25-32 and page 33 lines 14-25, **Derzay corresponding passages**, Col. 2, line 40-Col. 3, line 62; Col. 4, line 62-Col. 5, line21; Col. 6, lines 50-53; Col. 7, lines 14-50; Col. 7, line 65-Col. 8, line 10; Col. 10,

lines 23-42; Col. 12, lines 25-38; Col. 13, lines 34-53; Col. 18, lines 43-67; Col. 19, lines 18-58; Col. 20, lines 28-38; Col. 21, lines 4-45).

It became necessary to clarify this issue before examiner submission answer to the Broad of Appeal. Therefore, prosecution was re-open to give applicant an opportunity to resolve this issue. As suggested over the telephone interview (paper no. 11), the 102(f) issue can be easily resolved by simply filling affidavit, declaration to declare exact inventive entity that invented the claims subject matter.

Instead, applicant merely stated the inventive entity in this brief, such statement is insufficient to verify the inventorship of the claim invention "[a] prior art reference that is not a statutory bar may be overcome by two generally recognized methods": an affidavit under 37 C.F.R. § 1.131, or an affidavit under 37 C.F.R. § 1.132 "showing that the relevant disclosure is a description of the applicant's own work"); In re Facius, 408 F.2d 1396, 1407, 161 USPQ 294, 302 (CCPA 1969) (subject matter incorporated into a patent that was brought to the attention of the patentee by applicant, and hence derived by the patentee from the applicant, is available for use against applicant unless applicant had actually invented the subject matter placed in the patent)." MPEP § 2137.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/bj
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